INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute and rules involved	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:	
Fisher v. *United States*, 231 F. 2d 99	11
Freidus v. *United States*, 223 F. 2d 598	9, 12
Rolland v. *United States*, 200 F. 2d 678	9, 12, 13
United States v. *Achtner*, 144 F. 2d 49	10
United States v. *Debrow*, 346 U. S. 374	10
United States v. *Moore*, 185 F. 2d 92	12
United States v. *Pagano*, 224 F. 2d 682, 686, certiorari denied, 350 U. S. 884	13
United States v. *Provoo*, 215 F. 2d 531	14
Wilson v. *United States*, 232 U. S. 563	13
Statutes and rules involved:	
18 U. S. C. 1001	2, 3, 4, 9, 11, 12, 13
Federal Rules of Criminal Procedure:	
Rule 7 (c)	2, 8
Rule 52 (a)	3

399129—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 345

CHARLES SILVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–23; R. 612–619) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1956 (Pet. 15; R. 620). The petition for a writ of certiorari was filed on August 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an indictment drafted in the words of the false statement statute (which penalizes the making of a false statement in a matter within the juris-

diction of a department or agency of the United States) is defective for failure to allege materiality of the false statement. If so, whether the defect is a fatal one when a bill of particulars furnished defendant shows the materiality of the statement, the evidence establishes materiality, and the court's charge to the jury required it to find proof of materiality.

2. Whether the government's cross-examination of petitioner was improper.

STATUTE AND RULES INVOLVED

18 U. S. C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 7 (c), Federal Rules of Criminal Procedure, provides:

> *Nature and Contents.*—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference

in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 52 (a), Federal Rules of Criminal Procedure, provides:

Harmless Error.—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Petitioner was charged in a two-count indictment with knowingly making false statements in a matter within the jurisdiction of the Treasury Department, in violation of 18 U. S. C. 1001 (R. 3–4).[1] A motion to dismiss the indictment on the grounds, *inter alia,* that the materiality of the statements was not alleged, and

[1] The indictment was as follows:

"The Grand Jury Charges:

"On or about the 6th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he did not see one Carol Anderson during the months of January, February, March or April of 1953, whereas, in truth and in fact, as the defendant then and there well knew, he had seen

for a bill of particulars, was denied (R. 5–9). A bill of particulars was nevertheless filed. It specified that petitioner's false statements, *i. e.*, that he had not seen one Carol Anderson during the months of January, February, March or April of 1953, and that he had not used an alias in 1953, were material in that the Treasury Department was seeking to learn the whereabouts of Carol Anderson in order to ascertain whether she had witnessed bribes allegedly paid petitioner (R. 10). A jury found petitioner guilty (R. 608), and he was sentenced to one year's imprisonment on count one, and one year on count two, the latter sentence being suspended and petitioner placed on three years' probation following service of the sentence on count one (R. 2).

The following evidence was adduced at the trial:

A special agent of the Internal Revenue Service testified that in January, 1953, an investigation of petitioner, a long time employee of the Service who

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the said Carol Anderson during that period. (Title 18, Section 1001, United States Code).

"SECOND COUNT

"The Grand Jury further charges:

"On or about the 16th day of April, 1954, in the Southern District of New York, CHARLES SILVER, the defendant, unlawfully, knowingly and wilfully made a false, fictitious and fraudulent statement, in a matter within the jurisdiction of a department of the United States, namely, the Treasury Department, Internal Revenue Service, to the effect that he had not at any time used an alias or name other than his own, whereas, in truth and in fact, as the defendant then and there well knew, he had used an assumed name, namely Charles Anderson, on at least one occasion in 1953. (Title 18, Section 1001, United States Code)."

resigned on January 3, 1953 (R. 257), was initiated (R. 54). The investigation had its origin in statements of a convict in Sing Sing Prison that he had paid bribes to petitioner, and that the payments were witnessed by "an old time madam" named "Carol" (R. 59–61). Petitioner, when questioned on March 31, 1953, by the agent, denied accepting a bribe and admitted that around 1947 to 1948 he had known a woman named "Carol" whose last name he gave as "Anderson" and whose whereabouts, when last known to him, he gave as Westchester County (R. 62, 261–262, 264). No charges were filed against petitioner at that time for lack of substantiation of the convict's statements, but the investigation was reactivated when petitioner was restored to his position with the Internal Revenue Service in August 1953 (R. 68–69). Through the telephone company and the post office department, the investigating agent found that Carol Anderson had changed her name to Caroline Turchin (R. 70–71), that she had been convicted for running a disorderly house and that she had been sentenced to a term in Westchester Prison (R. 73). A visit by the agent to the prison on April 15, 1954, revealed that she had been released the previous summer and had left no forwarding address (R. 73). The prison records showed she had been visited in February 1953 by a "Charles Anderson" whose description fitted that of petitioner (R. 74).

On April 6, 1954, petitioner, questioned again by the agent, denied seeing Carol Anderson in January, February, March, or April of 1953 (R. 76). The agent

testified that his sole purpose in asking these questions was to find the Anderson woman so that he could question her about the bribes allegedly paid to petitioner and witnessed by her (R. 76). At an interrogation on April 16, 1954, petitioner denied that he had at any time used an alias or name other than his own (R. 80). These statements on April 6th and 16th form the basis of the two counts of the indictment.

Carol Anderson was eventually located in May 1954, as a result of information furnished by the warden of Westchester Prison (R. 127–129), and she denied that she saw any bribes paid to petitioner (R. 134).

Petitioner testified in his own behalf (R. 255–304). He admitted that he had visited Carol Anderson in jail and had taken gifts to her in February 1953 (R. 264, 299), but denied that he intended to mislead the agent in saying that he hadn't seen her during January, February, March, or April of 1953 (R. 279).[2] His explanation of the false statement as to use of an alias was that he thought the question related to the question immediately preceding it, which was (R. 277–278):

> Q. Have you been arrested for any reason other than traffic offenses during this time?
>
> A. Never—before or after.
>
> Q. Have you at any time used an alias, or name other than your own?
>
> A. No, sir.

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[2] He also admitted that when he gave the agent the name of "Carol Anderson", he knew she was listed in the phone book under the name of "Turchin" (R. 284).

On cross-examination petitioner admitted using an alias of "Charles Anderson" when he visited Carol Anderson in jail (R. 319–321).

Petitioner also explained on direct examination that he had told the agent he didn't know where Carol Anderson was, when he actually did know, because he "thought it unfair to her to have a stranger whom she had never met go up to visit her in jail" (R. 288), and because he didn't want his wife to be questioned by the agent, or to find out the type of person Carol was and that he had visited her in jail (R. 288–289). When petitioner began this explanation, government counsel warned (R. 290):

> Your Honor, before we get into this too deeply, I am loathe to object to this testimony inasmuch as intent is an element of this crime, but I want to have Mr. Spieler—Mr. Silver tell the jury as best he can what he had in mind. However, I feel that I should call Mr. Spieler's attention to the fact that this line of questioning may impose on me a duty to explore a line of questioning which to me will be distasteful and repugnant, but it will be my duty to inquire.

The court commented in reply that the door was open and everybody could walk right in (R. 290–291). Petitioner's counsel replied: "That is right. Yes, I want the jury to hear the whole story" (R. 291).

Over objection, the government on cross-examination questioned petitioner as to his relationship with Carol Anderson and his wife's knowledge of it, and it was brought out that he had had amorous relations with her (R. 355).

The question of the materiality of the false statements to the investigation being conducted by the Treasury Department was submitted to the jury at the request of counsel for both the government and the defense (R. 584–588). The court charged in part (R. 584–585, 586, 587):

> * * * I am going to charge you that it is for you to determine whether the questions put to the defendant on April 6, 1954, and April 16, 1954—and I am referring only to the two questions covered in the indictment—were material to the Treasury Department investigation then being conducted by Agent Bright * * * the question is whether the two queries that were put to the defendant by Agent Bright in connection with the investigation were material, whether they had a direct relationship, whether they had a connection of a substantial nature with regard to the inquiry then being conducted * * * and * * * related to a legitimate, proper and reasonable matter involved in the investigation * * * and * * * had a tendency or a natural operation of slowing up, delaying, dissuading, impeding or obstructing the investigation.

On appeal, the conviction was affirmed. The Court of Appeals held that the evidence amply showed the materiality of the questions to the investigation, that the factor of materiality was submitted to the jury under a proper charge, and that the indictment, being in the words of the statute, adequately apprised the petitioner of the charges against him as required by Rule 7 (c) of the Federal Rules of Criminal Procedure, *supra,* pp. 2–3, (Pet. 19). The court further

held that Congress did not specify materiality as an element of the crime of making a false statement in a matter within the jurisdiction of a department of the United States, and therefore it should not be implied by the courts (Pet. 19–21). Judge Frank, concurring, agreed in the result and all that his colleagues had to say except that he believed that the statute, by implication, did import the element of materiality (Pet. 22–23).

As to the allegedly improper cross-examination of petitioner, the Court of Appeals held that the questions as to petitioner's relationship with Carol Anderson were relevant and that petitioner had waived his right to object to the line of questioning when he opened up the issue on direct (Pet. 21–22).

ARGUMENT

1. The false statements statute, 18 U. S. C. 1001, *supra*, p. 2, under which petitioner was prosecuted, applies to "any matter within the jurisdiction of any department or agency of the United States" and consists of two clauses: the first makes willful concealment by trick, scheme or device a crime and requires that the concealment relate to "a material fact"; the second clause makes a willful false statement a crime, but contains no stipulation as to materiality. The indictment drafted in the words of the second clause contains no allegation of materiality.

Two circuit courts have held that there must be proof of materiality even under the second clause of 18 U. S. C. 1001. See *Rolland* v. *United States*, 200 F. 2d 678 (C. A. 5) and *Freidus* v. *United States*,

223 F. 2d 598 (C. A. D. C.) While petitioner urges a conflict because of the contrary view expressed by the majority below, that issue is not presented by this case since materiality, amply established by the evidence, was determined by the jury under a full and correct charge by the trial court. This being so, the sole issue here is one of pleading—whether petitioner must be retried because the indictment did not allege materiality, even though it was established by the evidence.

Under modern rules of pleading, an indictment which charges a statutory crime, as here, is generally regarded as sufficient if it follows the language of the statute, unless its generality either prejudices the defendant in the preparation of his defense, or endangers his constitutional guarantee against double jeopardy. *United States* v. *Debrow*, 346 U. S. 374, 377; *United States* v. *Achtner*, 144 F. 2d 49, 51 (C. A. 2). This indictment was phrased in the language of 18 U. S. C. 1001, and it is therefore incumbent upon petitioner to show how failure to allege materiality, conceding *arguendo* its relevance, prejudiced him either by hampering his defense or jeopardizing a future plea of *autrefois convict*. Petitioner makes no such showing of prejudice, and it is apparent from the record that he suffered none. Petitioner knew he had stated falsely, as charged in count one,[3] that he had not seen Carol Anderson at certain named times (R. 288) and that the agent who asked the question was looking for her as a possible witness to a bribe

[3] We do not discuss count two since the sentence on that count was suspended (R. 2).

petitioner had allegedly taken while employed by the Internal Revenue Service (R. 286). In any event, petitioner obtained a bill of particulars prior to trial which set forth the materiality of the statements in time for him to prepare his defense (R. 10). Ample evidence of materiality was presented to the jury, who went to their deliberations fully and correctly charged as to the test to apply in determining materiality (R. 60, 76, 584–588). The indictment was sufficiently definite as to names and dates to guard against the danger of another trial for the same statements (*supra*, pp. 3–4, fn. 1). As the Ninth Circuit found in *Fisher* v. *United States*, 231 F. 2d 99, 102, where it was also contended that the indictment failed to set forth the essentials of an offense under the second clause of 18 U. S. C. 1001 because materiality was not alleged:

> The Government contends that "materiality" is not an essential element of the crime of filing a false written document but that the term applies only to the first section of 18 U. S. C. § 1001 dealing with making a concealment of a material fact. *United States* v. *Lange*, D. C. S. D. N. Y. 1955, 128 F. Supp. 797; *United States* v. *Varano*, D. C. M. D. Pa. 1953, 113 F. Supp. 867. The language of Section 1001 seems to justify such a construction. However, even if an opposite construction is taken, appellant has not alleged that this defect in the indictment was prejudicial nor has he made any showing to this effect. Appellant knew the materiality of his statement. The statements ultimately proved were certainly material. If this is error, it is harmless error under F. R. Crim. P. 52 (a), 18 U. S. C.

The only case which indicates that an indictment for a false statement under the second clause of 18 U. S. C. 1001 must contain an allegation of materiality is *Rolland* v. *United States*, 200 F. 2d 678, 680 (C. A. 5);[4] and that decision, though it speaks in terms of failure to allege and prove materiality, held in substance that the false statement made was not "in [a] matter within the *jurisdiction* of a department or agency of the United States" (emphasis added), as required by 18 U. S. C. 1001. This becomes clear when the *Rolland* decision is read in the light of *United States* v. *Moore*, 185 F. 2d 92 (C. A. 5), which the *Rolland* decision cites. Materiality was discussed in *Moore* since the violation of 18 U. S. C. 1001 charged was under the first clause which requires materiality. However, the principal issue in *Moore* was whether the false statements were in a matter within the *jurisdiction* of the Wage and Hour Division, and the Fifth Circuit held in *Moore*, and reaffirmed in *Rolland*, that in making preliminary investigations to determine whether the employees of a business are covered by the Fair Labor Standards Act, the Administrator of the Wage and Hour Division is not exercising the jurisdiction conferred on him by the Act.[5] The technical pleading issue was

[4] Contrary to petitioner's contention (Pet. 8), the Court of Appeals for the District of Columbia in *Freidus* v. *United States*, 223 F. 2d 598, 602, fn. 13, expressly stated that it did not reach the question whether the indictment in that case, which was also cast in the words of 18 U. S. C. 1001, was insufficient for failure to specify materiality.

[5] The Fifth Circuit in its *Rolland* decision did not mention the fact that the *Moore* indictment was under the first clause

not central to the decision in *Rolland* and there is no significant or substantial conflict.

2. The cross-examination of petitioner as to his relationship with Carol Anderson was both relevant and proper under the circumstances.

Since petitioner admitted making the false statements as charged and denied only that he made them with any criminal intent (R. 264, 277, 319–321), the government's case turned upon whether it could show the jury that petitioner's avowed high purpose in lying to protect others, rather than to mislead the government, was a sham. When petitioner stated that he was only trying to shield his wife and Carol Anderson from questioning when he lied, and portrayed his relationship with Carol Anderson to be one of friendship, and his visits to her in prison to be motivated by sympathy and mercy (R. 288–289, 299, 341, 344, 363), he made his character and his relationship with Carol Anderson relevant factors in the case. The government was then forced to elicit on cross-examination just what that relationship was, and that his character was not as he had presented it to be. Cf. *Wilson* v. *United States,* 232 U. S. 563, 568–569; *United States* v. *Pagano,* 224 F. 2d 682, 686 (C. A. 2), certiorari denied, 350 U. S. 884.

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of 18 U. S. C. 1001, which specifically requires materiality. The distinction between the two cases on this point was not pointed out in the briefs before the Fifth Circuit until the government filed a petition for rehearing. Petition for Rehearing, No. 13,889, pp. 2–4. Since there were other grounds for its decision, the Fifth Circuit's denial of the petition does not necessarily mean that it rejected the distinction after it was called to its attention.

Petitioner was warned, both by the court and by government counsel, that his line of testimony on direct, while a witness in his own behalf, would open the door to a searching cross-examination (R. 290, 291). Petitioner's refusal to abandon it and his statement, through his counsel, that he wanted the jury to know the whole story (R. 291) renders inappropriate his objection now that his admissions of an illicit relationship with Carol Anderson were improperly brought out on cross-examination. Upon his insistence, the jury had the whole story.[6]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1956.

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[6] The case of *United States* v. *Provoo*, 215 F. 2d 531 (C. A. 2), cited by petitioner (Pet. 12–13), is inapposite here. In the *Provoo* case the defendant did not put his character in issue, and the questions as to his homosexuality had no relevance to a charge of treason.

U. S. GOVERNMENT PRINTING OFFICE: 1956